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Nos. 84-1493 and 84-1509

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, *et al.*,
Respondents,
and
SEATTLE-FIRST NATIONAL BANK,
Petitioner,
v.
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER SEATTLE-FIRST NATIONAL BANK

MARK A. HUTCHESON *
STEPHEN M. RUMMAGE
DAVIS, WRIGHT, TODD, RIESE & JONES
4200 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 622-3150

* *Counsel of Record for Petitioner Seattle-First National Bank*

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REPLY BRIEF FOR PETITIONER SEATTLE-FIRST NATIONAL BANK

Petitioner Seattle-First National Bank submits this Reply Brief in response to the Brief for Respondent Financial Institution Employees of America, Local 1182.

ARGUMENT

The union's brief gives scant attention to the right of free choice that underlies the rule announced in *Amoco Production Co.* (*Amoco IV*), 262 N.L.R.B. 1240 (1982), *aff'd sub nom. Local 4-14, OCAW v. NLRB*, 721 F.2d 150 (5th Cir. 1983). This oversight typifies the union's approach to affiliation issues. The International throughout this proceeding has evidenced concern solely for its institutional interest in expanding to include bargaining units previously represented by unaffiliated unions. The International has every right to advance that interest. It should not, however, be permitted to do so by sacrificing the statutory right of all employees, whether union members or not, to participate in the designation of their bargaining representative.

The rule applied by the Board here prevents that sacrifice, assuring that all employees will have a voice in the transfer of exclusive bargaining rights from the entity they have designated to a new affiliate of a large international union. The rule complements the Board's continuity test in a manner designed to maximize both employee free choice and stability in collective bargaining relationships. At the same time, the *Amoco* rule preserves a union's right to control its internal affairs by leaving the actual affiliation decision within the hands of the union itself. The Board's delicate balance of these considerations lies well within the scope of its administrative expertise. Adopted in the context of more frequent use of the affiliation tool by unions, and the product of years of debate among Board members, the *Amoco* rule is entitled to considerable deference.

I. THE *AMOCO* RULE IS ENTITLED TO DEFERENCE

Asserting that the Board's decision in *Amoco IV* altered a rule that "was settled for many years," [1] Local

[1] Of course, the union claims no reliance on Board precedent approving its actions. The employer repeatedly advised the Inde-

1182 argues that the Court in this case should show only minimal deference to the Board's administrative expertise. Union Br., pp. 15-16. A review of Board precedent, however, reveals that the Board's thinking on this issue has never been static, but has generally evolved toward greater protection of employee rights in connection with affiliations. Thus, as the Seventh Circuit observed in sustaining the *Amoco* rule, "the Board's approach to the affiliation issue has been anything but settled." *United Retail Workers, Local 881 v. NLRB*, 120 L.R.R.M. 2729, 2736 (7th Cir. Oct. 1, 1985).

The question presented in this case has prompted debate and division among Board members since the issue was first raised in 1963. Although a majority of the Board for several years agreed with the position advocated by the union, dissenting views were regularly and forcefully expressed. *See* Employer Br., pp. 18-19. Indeed, some members argued that the Board should not accept informal votes at all as the premise for transferring certifications from independent unions to newly-affiliated entities, believing that such changes should be accomplished in Board-conducted elections in which all employees could participate. *See Hamilton Tool Co.*, 190 N.L.R.B. 571, 576 (1971) (Chairman Miller, concurring); *Mosler Safe Co.*, 210 N.L.R.B. 934, 935 n.6 (1974) (footnote by Member Penello).[2] Against the backdrop of

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pendent that an exclusion of nonmember employees would directly violate then-existing Board precedent. *See* Employer Br., p. 6. The employer also advised unit employees that they were entitled to vote, regardless of union membership. R. 251 (J.A. 48). Unlike the union, employees might have relied upon existing Board law in declining to join the Independent in order to secure a voice in the representation decision.

[2] These views, when combined with Member Jenkins' dissent in *North Electric Co.*, 165 N.L.R.B. 942, 944 (1967) (Members Jenkins and Zagoria, dissenting), indicate that by 1974, a majority of the Board believed that all employees should have an opportunity to express their views on a transfer of certification from an inde-

this debate, the Board continued to develop its due process test to assure that recognition of a new affiliate's representative status did not fly in the face of employee sentiment. *See* Employer Br., pp. 17-18; Union Br., pp. 24-28.

The result of this dialogue was the *Amoco* rule, which, as Local 1182 observes, culminated the evolution of the Board's due process test. *See* Union Br., pp. 26, *et seq.*[3] The rule thus does not mark a departure from prior precedent, but represents the final step in the progress of administrative thinking. Not surprisingly, the Board has taken that step at a time when large unions have decided to make affiliations and mergers a cornerstone of their organizing efforts. *See* Employer Br., p. 38 & n.20. In these circumstances, the Court should, as it does in most such cases, defer to the Board's decision if it finds it rational and consistent with the National Labor Relations Act (the "Act"). *See NLRB v. Ensign Electric Division of Harvey Hubble, Inc.*, 767 F.2d 1100, 1102-03 & n.1 (4th Cir. 1985) (deferring to Board decision relying upon "an earlier viewpoint expressed in dissent"),

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pendent to a newly-affiliated union. However, Chairman Miller left the Board in December of 1974. The third member of the majority in *Jasper Seating Co.*, 231 N.L.R.B. 1025 (1977), Member Walther, joined the Board in November of 1975.

[3] Although accurately portraying an evolution in Board doctrine, the union's discussion of early Board cases incorrectly suggests that the Board initially confined its review of affiliations to continuity questions. The Board from the beginning examined both employee consent and continuity, though the inquiries were not neatly bifurcated and the examination of consent was too limited in scope. *See, e.g., Harris-Woodson Co.*, 85 N.L.R.B. 1215, 1216-17 (1949), *enf'd*, 179 F.2d 720, 722 (4th Cir. 1950); *American-Hawaiian Steamship Co.*, 10 N.L.R.B. 1355, 1361-62 (1939). Nearly 20 years ago, the Board recognized the distinct nature of the two issues and began conducting both a continuity test and an explicit due process inquiry designed to assure that the change in representative reflected a majority view. *See, e.g., North Electric Co.*, 165 N.L.R.B. 942 (1967). Even prior to that bifurcation, however, no Board decision recognized the exclusive representative status of a new affiliate without examining indicia of consent.

citing *Local 900, International Union of Electrical Workers v. NLRB*, 727 F.2d 1184, 1189 (D.C. Cir. 1984).

Nor should the Court's deference to the Board's expertise be diminished on the ground that "Board's very authority to act . . . is at issue." Union Br., p. 16. The Board has the power—indeed, the duty—to determine whether a union has been freely selected by a majority of employees in a bargaining unit. That is all the Board purported to do when Local 1182 presented its request for an amended certification.[4] It did not consider the impact upon the union's internal affairs of the decision to exclude nonmember union employees from the affiliation decision. Instead, the Board decided whether it should grant the new affiliate governmental recognition as the exclusive bargaining representative for all employees of Seattle-First National Bank. That determination lies well within the bounds of the Board's authority.

II. THE *AMOCO RULE* IS NECESSARY TO PROTECT EMPLOYEES' FULL FREEDOM TO DESIGNATE THEIR EXCLUSIVE BARGAINING REPRESENTATIVE

Like the court below, the union asserts that the right of employees to select their exclusive bargaining representative is fully protected after an affiliation provided

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[4] Although the Act does not mention amended certifications, the Board has decided to permit amendments in some circumstances. If the Board has that power, as all parties here agree, it must *a fortiori* have the power to assure that the amendments it grants do not undermine "the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). According to the union, however, the issue is whether the Board has authority to regulate internal union affairs. Union Br., p. 16. This approach begs the question by presupposing that the new affiliate's representative status is an internal union matter. *See United Retail Workers, Local 881 v. NLRB*, 120 L.R.R.M. at 2737 (describing identical "presupposition"). This erroneous assumption pervades the union's brief.

the Board satisfies itself that no substantial change in the representative has been accomplished. Union Br., pp. 19-24. Indeed, the union claims that this requirement of continuity is logically incompatible with the *Amoco* requirement of unit-wide consent. Union Br., pp. 28-31. However, these arguments depend upon a fundamental misperception of Board doctrine.

A. The Continuity Inquiry Standing Alone Does Not Adequately Protect Employees' Full Freedom to Select Their Bargaining Representative.

The union acknowledges that the Independent's affiliation here effected a change in the bargaining representative chosen by the Bank's employees. *See* Union Br., pp. 22-23 (discussing affiliation as "transformation," "evolution" and "change"). The *fact* of change thus is not at issue when a union petitions for a post-affiliation amended certification. Rather, the Board must consider the *significance* of the requested change from the previously certified entity to the new affiliate. A finding of continuity therefore does not represent a determination that the two entities are precisely the same, but reflects the Board's conclusion that the changes effected by affiliation are, in its view, "insubstantial." *See* Cert. App. 20a.

Whether substantial or not, the changes that result from an affiliation relate to the union's identity[5] and,

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[5] In arguing that the Independent's identity was not affected by the affiliation, the union makes an interesting, but logically flawed, analogy to the westward expansion of the United States. Union Br., pp. 20-21 n.12. The union may be correct in observing that our nation retained its identity as it grew. But the identity of entities assimilated through the expansion of the United States, such as the Republic of Texas, clearly changed through their transformation from independent status to statehood. Moreover, the union's analogy is inapposite for a more fundamental reason. As they became states, newly assimilated territories retained substantial elements of their inherent sovereignty. *See United States v.*

hence, its entitlement to assume the exclusive representative status enjoyed by its predecessor. This explains why the Board has always engaged in a post-affiliation examination of continuity, an inquiry that neither the union nor the court below has questioned. This represents a significant concession, for the continuity test is justified solely by the fact that an affiliation is an external change different in nature from the more common internal union changes discussed by Local 1182. *See* Union Br., p. 22. In contrast, the Board has never examined continuity after elections of union officers, modifications of union policy, amendments to union bylaws, or similar actions, because these events concern only the manner in which the entity selected by unit employees exercises the bargaining rights delegated by those employees. Unlike an affiliation, they do not speak to the very identity of the chosen representative.

In deciding whether a particular affiliation undermines continuity of representation, Board members necessarily exercise their subjective judgment. Not surprisingly, differences of opinion have arisen. In the 1970's, for example, two members of the Board advocated the proposition that an affiliation of an independent union with a large international union *ipso facto* results in a

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Wheeler, 435 U.S. 313, 320 (1978) (states' power inheres in sovereignty, rather than deriving from federal government). In contrast, new local unions have only those powers granted to them by their International, much like a municipality, which has only "such power [as] has been granted by the State . . ." *Wheeler*, 435 U.S. at 321. *See* Leisersen, *American Trade Union Democracy* (1959) 280 ("As municipalities are subject to the constitutions and laws of the states, so the locals are subject to the constitutions and laws of the national unions of which they are subordinate branches; and, as some states grant more home rule to their cities than others, so some national unions grant more home rule to their local unions than others do.") In this case, for example, Local 1182's very power to enact its bylaws came not from inherent autonomous authority, but from a "grant" of power from the International. Ex. P-29, Preface; Ex. E-1, § 24(A) (J.A. 146).

significant change of the bargaining representative. *Jasper Seating Co.*, 231 N.L.R.B. 1025, 1027 (1977) (Member Penello, concurring); *Hamilton Tool Co.*, 190 N.L.R.B. at 576 (Chairman Miller, concurring). *See also Ocean Systems, Inc.*, 223 N.L.R.B. 857, 862 (1976) (Member Walther, dissenting), *enf'd sub nom. J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978). The Third Circuit Court of Appeals has agreed with this assessment, *see, e.g., Sun Oil Co. of Pennsylvania v. NLRB*, 576 F.2d 553 (3d Cir. 1978), as has at least one commentator. R. Williams, *NLRB Regulation of Union Bargaining Rights When Affiliation Changes* (U. Pa. 1982) at 31. Others have rejected this view.

This case, in its present posture, does not call for a resolution of the conflicting approaches to continuity.[6]

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[6] It is nevertheless worth noting that the affiliation of the Independent to the International resulted in precisely the changes that have troubled the Third Circuit and certain Board members. *See Sun Oil Co. of Pennsylvania*, 576 F.2d at 557. *Cf.* Union Br., p. 24. For example, Section 24(A) of the RCIU Constitution permitted locals, such as Local 1182, to adopt bylaws only if consistent with the International Constitution and approved by the International. *See* Tr. 167, 220 (J.A. 29, 41). The International had power to place Local 1182 in trusteeship at the discretion of the International President, suspending Local 1182's autonomy. Ex. E-1, §§ 9(K)(1), 9(K)(2)(e) (J.A. 115, 117). With respect to strikes, the International Constitution provided that "[n]o Local Union shall engage in a strike or other economic measures without first receiving the authorization of the International President and otherwise complying with" provisions of the constitution. Ex. E-1, § 32(E)(1) (J.A. 170). The International also reserved the right to approve or disapprove the terms of Local 1182's proposed collective bargaining agreements. Ex. E-1, §§ 32(A), 32(B), 32(D)(2) (J.A. 167-68). Furthermore, the International could order Local 1182 to cease any activities deemed inimical to "the best interests of the International Union. . . ." Ex. E-1, § 9(M) (J.A. 121). The International's authority even extended to day-to-day business matters, including forms and supplies used by Local 1182, Ex. E-1, § 29(C) (J.A. 159), and the Local's bookkeeping system, § 26(G)(2) (J.A. 152).

See Employer Br., p. 17 n.4. The mere existence of these differing views, however, demonstrates that no bright line distinguishes significant from insubstantial changes in the certified entity. Changes that appear minor to one person might be deemed substantial by another. Given that fact, the union's plea for exclusive reliance upon the Board's subjective continuity determination is necessarily flawed. Congress conferred upon employees, not the Board, the power to distinguish among those who seek to act as their representatives. Accordingly, employees must be afforded the opportunity to assess the significance of changes in their certified bargaining agent. Any other approach pays mere lip-service to employees' "full freedom" to designate their representatives, Section 1 of the Act, 29 U.S.C. § 151, replacing it with a paternalistic approach that grants the Board alone power to evaluate an affiliation's probable impact on employee support.

Furthermore, by suggesting that the Board be confined to its continuity test, the union essentially asks that the due process inquiry be abandoned *in toto*. Union Br., p. 29. Under the union's approach, a finding of continuity would preclude the Board from questioning an affiliation accomplished, for example, solely by action of a union's executive council, without any input from unit employees, so long as no schism within the union resulted.[7] *See* Union Br., p. 21 at n.12. In these circumstances, the union appears to argue, employees are appropriately presented with a *fait accompli*, relegated to

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[7] The practical consequences of the union's approach are illustrated by its disparaging reference, Union Br., p. 28, to the Board's decision in *Peco, Inc.*, 204 N.L.R.B. 1036 (1973). The Board in *Peco* denied an amended certification because two elections failed to satisfy the due process test. The first was held at a time when an entire shift of employees could not participate, while the second was affected by confusion as to whether it was the actual vote. 204 N.L.R.B. at 1038. The union's approach would authorize such flippant treatment of employees' right to choose their bargaining representative.

their right to file a decertification petition under Section 9(c) of the Act, 29 U.S.C. § 159(c), to undo what has been done in disregard of their wishes. *See* Employer Br., p. 21 n.6.

Limiting the Board to the continuity test would thus invite abuse of the certification amendment process, opening the door for unions that wish to impose their will upon reluctant bargaining units. Indeed, the consequences of barring an examination of due process are so repugnant to modern notions of democracy that even the court below rejected the union's invitation to eviscerate Board precedent on this issue. *See* Cert. App. 21a n.15. Because the continuity inquiry cannot protect against jeopardy of these democratic values, it cannot stand alone.

The Board's due process test, then, rationally complements its review of representational continuity, providing assurance that the new affiliate is not running roughshod over employees' desires. Once one acknowledges that the Board must examine due process, the Act furnishes no rational basis to deny the protection of that inquiry to nonunion represented employees. *See* Employer Br., p. 19. To the contrary, the Act protects *employee* freedom of choice, not freedom of choice of union members, and assures *all* employees that they have the right to choose their bargaining representative even if they decide not to join a union. *See* § 7 of the Act, 29 U.S.C. § 157.

B. The *Amoco* Rule Is Compatible with the Continuity Inquiry.

The inadequacy of the continuity test standing alone does not establish its incompatibility with the due process test, including *Amoco's* requirement of unit-wide consent. Cf. Union Br., p. 28, *et seq.* Far from being in conflict, the two inquiries interact to protect both stability and free choice. When a new affiliate is substantially

similar to the previous bargaining representative, *i.e.*, when continuity exists, the Board will not require a test of majority status through a Board-conducted election; however, reliable evidence of employee consent to the new bargaining representative must be provided. When, on the other hand, the affiliation creates a dramatically different entity, the integrity of the Board's certification demands selection of the bargaining representative through the "laboratory conditions" of a Board-supervised election, regardless of informal evidence of employee consent.

The Board thus protects employee freedom of choice by assuring that obviously major changes in the bargaining representative are accomplished only through "the carefully supervised and controlled procedures which apply" in Board proceedings, *Hamilton Tool Co.*, 190 N.L.R.B. at 576 (Chairman Miller, concurring), while accepting less drastic alterations based upon informal evidence of employee consent collected by the union itself. Employee consent properly remains the *sine qua non* of accepting informal proceedings at all. The Board's approach, by looking to both consent and continuity, appropriately accommodates the Act's dual goals of employee freedom of choice and stability.

III. THE *AMOCO* RULE ENHANCES STABILITY IN BARGAINING RELATIONSHIPS

Like the court below, Local 1182 claims that the *Amoco* rule will unnecessarily disrupt industrial stability. Union Br., pp. 34-36. However, the union alludes only to the consequences of a breach of the *Amoco* standard. It does not discuss the impact of the rule in situations in which unions choose to abide by the law, as the vast majority doubtless will. In those circumstances, the *Amoco* rule will likely enhance stability in bargaining relationships. *See* Employer Br., pp. 25-28 (discussing

decision below). As the Seventh Circuit recently observed in the context of a union merger:

> Under *Amoco*, a union is certain to include all unit employees in a merger vote. If the vote carries, employers faced with certain majority support for the post-merger organization might be dissuaded from further contesting the validity of the merger.

United Retail Workers, Local 881 v. NLRB, 120 L.R.R.M. at 2739. If the unit-wide vote does not carry, on the other hand, a union may choose to forego affiliation and thus maintain existing representation of the unit. If a union chooses to affiliate notwithstanding an absence of unit support, of course, disruption will occur. That disruption, however, will result not from the *Amoco* rule, but from employees' freely expressed rejection of the new affiliate's effort to speak on their behalf.

Because the *Amoco* rule simply requires that the union provide all unit employees with an opportunity to express their views on representation, it sets no trap for the unwary. Thus, bargaining rights will be suspended without employee consent only if a union flouts the law by muting the voice of nonunion employees. In such a situation, as here, one would logically question whether the union's conscious exclusion of some represented employees stemmed from its awareness of a lack of majority support or a desire to thwart full and free discussion of representation issues. Accordingly, a court should "hesitate to endorse the election of a union that has deliberately disenfranchised an entire group of otherwise eligible voters." *United Retail Workers, Local 881 v. NLRB*, 120 L.R.R.M. at 2738.

The noncomplying union's recourse is simple. It may, after soliciting expressions of interest from the bargaining unit, "compel a unit-wide, Board-conducted election with binding results." *Id.* at 2739. This provides relief precisely tailored to the union's violation of *Amoco*: a

vote in which those employees barred from the initial decision would be entitled to participate.[8] That election will, in the long run, enhance stability, for industrial strife can be minimized only through a guarantee of employees' "full freedom" to designate their bargaining representative. *Mastro Plastics v. NLRB*, 350 U.S. 270, 280 (1956).

IV. THE *AMOCO* RULE NEITHER INTRUDES UPON INTERNAL UNION AFFAIRS NOR CONTRAVENES CONGRESSIONAL INTENT

Finally, the union argues that the *Amoco's* rule improperly intrudes upon internal union affairs, in contravention of Congressional intent. Union Br., pp. 36-48. In fact, however, the rule does not purport to govern the union's internal decision to affiliate. Rather, it addresses the exclusive representative status of the new affiliate, a matter entirely external to the union's power as a voluntary association of dues paying members. *See United Retail Workers, Local 881 v. NLRB*, 120 L.R.R.M. at 2737. *See also* Employer Br., p. 31.

The only consequence of the *Amoco* rule is that nonmembers may express their views as to the new affiliate's desire to be their exclusive bargaining representative. No one suggests that nonunion employees must have a voice on the question of affiliation *per se*.[9] As Judge

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[8] This approach makes far more sense than imposing the union willy-nilly upon employees, subject to their right to initiate the complex decertification process. *See* discussion, *supra* at pp. 9-10.

[9] The union mischaracterizes the vote required by the *Amoco* rule, suggesting that nonunion employees may "decide whether they prefer the union to be affiliated with another entity or to be unaffiliated." Union Br., p. 30. However, under *Amoco*, nonunion employees must be given an opportunity to vote only on the exclusive representative status of the new affiliate. As both the employer and the Board have pointed out, a union may comply with *Amoco* without permitting nonmember participation in the actual affiliation decision. *See* Employer Br., p. 28; NLRB Br., p. 25. By declining to acknowl-

Wright noted in dissenting below, "nonmembers may not force affiliation because the decision to hold an affiliation election remains the province of the union." Cert. App. 26a. Nor may nonmembers block an affiliation, for the union has the right to decide as an internal matter to affiliate despite the absence of majority support within the unit. The lack of employee support would simply prevent the new affiliate from acting as the exclusive representative for the unit, in accordance with Section 9(a) of the Act, 29 U.S.C. § 159(a).

Thus, whether or not unit employees choose to acquiesce in representation by the new affiliate, a union has exclusive control over the manner in which it will resolve the internal affiliation question. *See* Employer Br., p. 28 n.11; NLRB Br., p. 25. In many cases, such as when there is 100% union membership within the represented unit, a vote of union members will correspond to the franchise mandated by *Amoco*. In other cases, the union may decide to hold a separate vote on transfer of certification after membership approval of the affiliation. Still another alternative would be a unit vote on representation preceding the membership election, with a favorable result contingent upon union members' approval of the affiliation. And some unions may simply choose to allow all unit employees to vote on the affiliation itself, regardless of membership.

The availability of these options demonstrates that the *Amoco* rule does not "regulate processes Congress decided to leave unregulated by federal law." Union Br., p. 46. The only procedure that the Board purports to oversee is that by which an affiliated entity assumes the statutory representative status previously enjoyed

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edge the nature of the vote required by *Amoco*, the union studiously avoids dealing with the substantial similarity between an initial representation decision and the solicitation of consent required by *Amoco*. *Cf.* Union Br., p. 30.

by an unaffiliated entity.[10] The union's lengthy discussion of the legislative history to the Labor Management Reporting and Disclosure Act ("LMRDA") contains no suggestion that Congress intended to prohibit the Board from examining the impact of an affiliation on the Board's certification of employees' exclusive bargaining representative. In considering the LMRDA, Congress did not concern itself with the statutory rights of non-union employees, but focused on the rights of union members to participate in union affairs. As one of the sponsors of that legislation observed, the LMRDA dealt with "union democracy," in contrast to the Act, which concerned "the rights of employees. . . ." 2 Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959 (NLRB ed.) at 1518 (remarks of Representative Landrum).

One must, then, look at the Act, which grants all employees certain rights, including the right to select their bargaining representative, that they do not lose simply because they decline to join a union.[11] *See Brown v.*

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[10] Here, the newly-affiliated union *asked* the Board to approve its exclusive representative status by filing a petition to amend the Board's certification. *See* Employer's Br., p. 30. No such imprimatur is requested after "a union election, a union constitutional amendment or any other union decision . . ." *See* Union Br., p. 33. The difference in treatment stems from the fact that only an affiliation alters the very entity chosen by employees and certified by the Board under the Act.

[11] The legislative history of the Act does not indicate that Congress contemplated the representational consequences of an affiliation election. However, in a colloquy with Senator Borah, United Mine Workers President John L. Lewis expressed the view that employees "certainly" have the right to choose representation by unions "that for reasons of their own have not seen fit to affiliate with the national movement." 1 Leg. Hist. of the National Labor Relations Act 1935 (NLRB ed.) at 180. Adoption of the union's position here would seriously impair that right by telling employees that their choice of an unaffiliated union becomes meaningless as soon as that union decides to affiliate. Here, of course, the Bank's

Hotel Employees, Local 54, 104 S. Ct. 3179, 3192-93 n.3 (1984) (White, J., dissenting). Nothing in the Act (or the LMRDA) deprives the Board of the power to protect those rights when it finds them jeopardized, or requires the Board to abandon protection of employees whenever a union labels its action "internal" in nature. To the contrary, the goal of protecting employee rights is paramount, even if it ostensibly restricts a union's right to self-governance. *Scofield v. NLRB*, 394 U.S. 423, 430 (1969). *See* Employer Br., pp. 33-35.

In light of these policies, the propriety of the *Amoco* rule cannot be doubted. The rule refrains from intruding upon a union's internal decisions, granting the union broad leeway to determine the means by which it effects affiliation and, in particular, permitting the union to exclude nonunion employees from the actual affiliation decision. The Board requires only one thing: that the unit as a whole be given an opportunity to consent before the new affiliate is granted governmental recognition as the exclusive representative of all employees, union and nonunion alike. This requirement poses no threat to internal union governance.

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employees in 1970 made a considered determination that they did not wish to be represented by an affiliate of a national body, but rather by an independent, home-grown union. *See* Employer's Br., p. 22 n.7.

CONCLUSION

For these reasons, the judgment and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed. The Supplemental Decision and Order of the National Labor Relations Board should be reinstated.

Respectfully submitted,

MARK A. HUTCHESON *
STEPHEN M. RUMMAGE
DAVIS, WRIGHT, TODD,
RIESE & JONES
4200 Seattle-First National
Bank Building
Seattle, Washington 98154
(206) 622-3150

* *Counsel of Record for Petitioner Seattle-First National Bank*

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